NO. 80-1651

Office-Supreme Court, U.S.
FILED
MAR 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES LEONARD and WILLIAM SHARROCKS,
Petitioners,

-against-

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLEN LASHLEY
16 Court Street
Brooklyn, New York 11201
(212) 875-1128

Counsel for Petitioner
JAMES LEONARD

ROBERT KRONENBERG
350 Broadway
New York, New York 10007
(212) 431-7410

Counsel for Petitioner
WILLIAM SHARROCKS

RONALD P. FISCHETTI
ANNE C. FEIGUS
Of Counsel

March 26, 1981

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JAMES LEONARD and WILLIAM SHARROCKS,

Petitioners,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The order of the Court of Appeals appears in the appendix hereto at p. 1a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 26th, 1981. This petition for certiorari is being filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fifth Amendment to the United States Constitution states as follows:

> "AMENDMENT V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compeled in any criminal case to be a witness against himself; nor shall private property be taken for public use, without just compensation."

QUESTIONS PRESENTED

1. Whether the material variance between the indictment and the government's proof at trial, coupled with the misleading nature of a supplemental instruction given by the district court, deprived petitioners of their constitutional rights to a fair trial and due process of law?

2. Whether the district court improperly considered, in imposing sentence upon petitioner Sharrocks, his failure to cooperate with the authorities in derogation of petitioner's Fifth Amendment privilege against self-incrimination?

The petitioners James Leonard and William Sharrocks respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on January 26th, 1981.

TABLE OF CONTENTS

Page

Questions Presented 2

Opinion Below 2

Jurisdsiction 2

Constitutional Provision Involved in the Case 2

Statement of the Case 3

Reasons for Granting the Writ 4

A. The Material Variance Between the Indictment and the Government's Proof at Trial, Coupled with the Misleading Nature of a Supplemental Instruction Given by the District Court, Deprived Petitioners of Their Constitutional Rights to a Fair Trial and Due Process of Law 4

B. The District Court Improperly Considered, In Imposing Sentence Upon Petitioner Sharrocks His Failure to Cooperate with the Authorities in Derogation of Petitioner's Fifth Amendment Privilege Against Self-Incrimination 7

Conclusion 8

Appendix "A"—Opinion 1a

TABLE OF CASES

Kotteakos v. United States, 327 U.S. 750 (1946).....6

Roberts v. United States, 100 S. Ct. 1358 (1980).....7

STATEMENT OF THE CASE

The indictment in the case at bar charged sixteen named defendants, including petitioners, as well as approximately seventy unindicted co-conspirators, with a far-flung narcotics conspiracy and various substantive offenses. According to the government, the conspiracy embraced a period from approximately January of 1970 through April of 1979 and included the unlawful importation and distribution of marijuana, hashish and cocaine. Prior to trial, several defendants entered pleas of guilty and agreed to cooperate with the government. Petitioners James Leonard and William Sharrocks proceeded to trial with six other defendants. The government's evidence was voluminous and extremely complex. Its seven principal witnesses each testified to a myriad of individual transactions, not only among and between the named defendants, but involving most, if not all, of the seventy unindicted co-conspirators as well.

From the outset of trial through its conclusion almost two and one-half months later, defense counsel concertedly and vehemently challenged the validity of the all-encompassing conspiracy espoused by the government. Defense counsel contended that the government's proof failed to establish the single conspiracy charged in the indictment, but revealed instead a number of discrete, unrelated conspiracies. The district court ultimately ruled that this determination should be made by the jury.

At the conclusion of the trial, the district court included a multiple conspiracy instruction in its charge to the jury. After lengthy deliberations, however, the jury requested further clarification of the procedure to be followed for identifying the conspiracy charged in the indictment in relation to other separate conspiracies. At that juncture, the district court gave a supplemental instruction upon this issue to which defense counsel duly objected.

REASONS FOR GRANTING THE WRIT

THE CORRECTNESS OF THE DECISION BELOW IS OPEN TO SERIOUS QUESTION

A. The Material Variance Between the Indictment and the Government's Proof at Trial, Coupled With the Misleading Nature of a Supplemental Instruction Given by the District Court, Deprived Petitioners of their Constitutional Rights to a Fair Trial and Due Process of Law.

Petitioners Leonard and Sharrocks respectfully contend that, contrary to the reasoning of the court below, the material variance between the indictment and the government's proof at trial, coupled with the misleading nature of a supplemental instruction* given by the district court,

---

* In its supplemental instruction, the court stated:

"Now, in responding to this note, I remind you that what I say here does not supersede my previous instructions.

In specific answer to your inquiry, I instruct you that to identify one of the assumed multiple conspiracies as the conspiracy charged in Count 1, you must finc that the purpose or object of that conspiracy was identical, in whole or in part, with one or more of the purposes or objects spelled out in Paragraphs 1 through 7 of Count 1. In other words, to find that the conspiracy charged in Count 1 existed, it is not necessary to find that all of its purposes or objects were accomplished. I remind you that a conspiracy may be found to exist even though the conspirators wholly failed to carry out its purposes or objects. Thus, if you find beyond a reasonable doubt, from the evidence, that an identifiable group of conspirators did unite their efforts and took steps to carry out any one or more of the purposes or objects spelled out in Paragraphs 1 through 7 of

resulted in substantial prejudice which deprived them of their constitutional rights to a fair trial and due process of

---

Footnote continued from preceding page

Count 1, then, however limited their participation or their success, the criminal offense has been committed.

You will recall that certain witnesses for the Government testified to meetings, discussions, and actions they undertook with one another to import and deal in hashish, marijuana and cocaine. If you believe their testimony beyond a reasonable doubt, you may find that some of the purposes and objects of the conspiracy charged in Count 1 were accomplished.

You may also justifiably find that some of the acts and transactions involved different actors, times and places and a different substance; in which event, you might conclude that that was a separate and distinct conspiracy from the one charged in Count 1.

The basic question before you is whether any of the defendants on trial here, by their own statements as heard by witnesses, or actions observed by witnesses, were knowing participants in the accomplishment or attempt to accomplish any of the purposes or objects of the conspiracy charged in Count 1. If the evidence does not satisfy you beyond a reasonable doubt of a defendant's participation in such a conspiracy, you must acquit that defendant on that charge. If, on the other hand, you are satisfied beyond a reasonable doubt, by a defendant's statements and actions, that he did kowingly join with acknowledged conspirators in importing or dealing hashish, marijuana or cocaine, you must convict that defendant unless you believe that his actions, if any, related to group activity so separated in time, composition of personnel, or substance involved as to warrant the belief that it was unrelated to the transactions of the acknowledged conspirators; in other words, a separate conspiracy not fairly embraced within the conspiracy charged in Count 1.

As I have previously instructed you, if you find that a defendant was involved solely with a separate conspiracy not charged in Count 1, then you must acquit him. Bear in

law. The prejudice stemmed directly from the fact that the proof adduced by the government conclusively established numerous discrete conspiracies rather than the single conspiracy charged in the indictment.

The difficulties engendered by this material variance culminated in serious confusion experienced by the jury during its lengthy deliberations in its efforts to identify respective conspiracies and to determine their interrelationships. Petitioners assert that the supplemental instruction of the district court, given in response to these inquiries, was vague, misleading and wholly failed to provide the jury with concrete guidelines for its most critical fact-finding determination--namely, the individual accountability of a particular defendant with regard to the conspiracy charged.

In support of the instant petition, petitioners respectfully submit that the question presented is one of great importance. It cannot be disputed that courts have become increasingly aware of the dangers inherent in the government's reckless misuse of the single conspiracy indictment format for the sake of convenience. This Court is urged to grant review in the case at bar in order to halt this practice by reaffirming the safeguards enunciated in *Kotteakos v. United States,* 327 U.S. 750 (1946).

Footnote continued from preceding page

mind, however, that a defendant may be a member of a separate conspiracy not charged in the indictment and also one that is." (A714-716)

B. The District Court Improperly Considered, in Imposing Sentence Upon Petitioner Sharrocks, His Failure to Cooperate With the Authorities in Derogation of Petitioner's Fifth Amendment Privilege Against Self-Incrimination.

This Court is likewise urged to grant review in the instant case upon the grounds that the district court misconceived and misapplied this Court's recent holding in *Roberts v. United States,* 100 S. Ct. 1358 (1980). Here, unlike *Roberts,* petitioner Sharrocks' claim of privilege was made in a timely fashion and asserted unequivocally in conjunction with the exercise of another constitutional right—the right to appeal. The district court's understanding that *Roberts, supra,* sanctioned its consideration of petitioner's failure to cooperate in imposing sentence was erroneous and penalized petitioner Sharrocks for the valid exercise of a basic constitutional right, a result universally condemned by this Court. The predominance of the Fifth Amendment in the constitutional scheme requires an authoritative response from this Court upon this basis as well.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

ALLEN LASHLEY
ROBERT KRONENBERG
Counsel for Petitioners
JAMES LEONARD and
WILLIAM SHARROCKS

ANNE C. FEIGUS
RONALD P. FISCHETTI
Of Counsel

APPENDIX "A" OPINION

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the twenty-sixth day of January, One Thousand nine hundred and eighty-one.

PRESENT:
HON. J. EDWARD LUMBARD
HON. ELLSWORTH VAN GRAAFEILAND
HON. AMALYA L. KEARSE
Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES LEONARD, WILLIAM SHARROCKS,

Defendants,

JAMES LEONARD, WILLIAM SHARROCKS,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was agued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO
Clerk

By: s/Edward J. Guardaro
Deputy Clerk

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

No. 80-1651

FILED
APR 29 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES LEONARD AND WILLIAM SHARROCKS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Roberts v. *United States*, 445 U.S. 552	6, 7
United States v. *Cambindo Valencia*, 609 F.2d 603	5
United States v. *Tramunti*, 513 F.2d 1087, cert. denied, 423 U.S. 832	3, 5
United States v. *Tucker*, 404 U.S. 443	6

Statutes:	
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	1

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1651

JAMES LEONARD AND WILLIAM SHARROCKS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners argue (Pet. 4-7) that they were prejudiced by a variance between the indictment and the proof at trial and that the district court erred in imposing sentence when it relied on petitioner Sharrocks' failure to cooperate with the government.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiring to distribute controlled substances, in violation of 21 U.S.C. 846.

Petitioner Sharrocks was also convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Leonard was sentenced to five years' imprisonment on the conspiracy count. Petitioner Sharrocks was sentenced to consecutive terms of five years' imprisonment on the conspiracy count and five years' imprisonment on the substantive count. The district court also imposed cumulative fines of $10,000 and a five year special parole term on petitioner Sharrocks. The court of appeals affirmed without opinion (Pet. App. A).

2. The evidence at trial showed that petitioners were part of a drug smuggling ring that specialized in importing large quantities of marijuana and hashish into this country through international air carriers at Kennedy Airport in New York. Over the course of a nine-year period, the conspirators repeatedly followed a pattern of smuggling large shipments of drugs past U.S. customs officers by using contacts in the freight offices of various international airlines, including Alitalia, Braniff, Pan Am, Japan Air Lines, and Trans Mediterranean Airlines (see, *e.g.*, Tr. 263, 300-303, 2168, 2178, 3161-3175, 4001, 4024-4027, 4104, 4108-4111, 4208-4209). Petitioner Sharrocks was one of the leaders of the smuggling ring, particularly during the later years of its operation. Petitioner Leonard, who participated in the group's ventures from the early 1970's until 1979, served chiefly as an assistant to Sharrocks during the later years of the conspiracy (see Tr. 2259-2260, 2271-2273, 3993-3996, 4003-4004, 4170-4177; see also Tr. 380, 861, 2078, 3263).

3. Petitioners first claim (Pet. 4-7) that the evidence showed multiple conspiracies rather than the single conspiracy charged in count one of the indict-

ment. Although the multiple conspiracy issue was submitted to the jury, petitioners contend (Pet. 6) that the district court's supplemental instruction on this issue was "vague, misleading, and wholly failed to provide the jury with concrete guidelines" for determining the individual guilt of each alleged co-conspirator.

In fact, however, there was no variance at all between the charge in the indictment and the proof at trial. The proof established that, throughout virtually the entire period of the conspiracy, the core group of conspirators—including petitioners and five other men—followed a remarkably similar pattern in smuggling drugs into this country. They developed contacts at the freight offices of international airlines at Kennedy Airport. They then arranged for large shipments of drugs to be sent by air freight on board one of those airlines. The contact person at the airline would remove the package of drugs and manipulate the records so that the drugs would not have to pass through Customs. The conspirators would then distribute the drugs through a wholesale distributor —usually the same person. Thus, rather than showing multiple conspiracies, the evidence strongly supported the government's allegation that petitioners were part of a unified, and remarkably stable, conspiracy that involved repeated similar acts of drug smuggling over a number of years. This evidence fairly compelled the conclusion that the conspiracy charged in this case was "one general business venture." *United States* v. *Tramunti*, 513 F.2d 1087, 1106 (2d Cir.), cert denied, 423 U.S. 832 (1975).

Nor was the district court's charge erroneous. The court gave an initial charge on multiple conspiracies (Tr. 7588-7592) that petitioners conceded below

(C.A. Br. 28) was correct. The court thereafter twice responded to questions from the jury by repeating its entire charge on conspiracy. See Tr. 7625-7641, 7692-7707. The repeated instructions included the full text of the court's charge on multiple conspiracies. See Tr. 7633-7636, 7703-7706.

The jury then asked a question regarding multiple conspiracies (Tr. 7827):

> * * * assuming multiple conspiracies are found, we need clarification as to the standard to be used in identifying one of the multiple conspiracies as the conspiracy charged in count one.
>
> * * * Following the same assumption, we also need enlightenment as to the relationship then existing between the conspiracy identified as Count one and the remaining multiple conspiracies.

In response to this question, the court gave the supplemental instruction that is quoted at pages 4-6 n.* of the petition. In essence, the supplemental instruction advised the jury that, in order to find any defendant guilty, the jury must find that the conspiracy described in count one of the indictment existed and that the individual defendant knowingly participated in that conspiracy. The court further instructed that, if the jury found that the evidence did not establish the conspiracy alleged in count one, or if it concluded that any defendant was not a knowing participant in that conspiracy, it should acquit that defendant. The court added that, if a defendant was involved solely in a separate conspiracy, he must be acquitted.

This charge correctly stated the law and accurately answered the jury's question. The jury was correctly told that it could convict any defendant if it found

multiple conspiracies, but *only* if (a) it found that one of the conspiracies was the same as that charged in the indictment (*i.e.*, a conspiracy having as its objects one or more of the objects listed in the indictment) and (b) it found that the defendant knowingly participated in that conspiracy. See *United States* v. *Tramunti, supra,* 513 F.2d at 1107; *United States* v. *Cambindo Valencia,* 609 F.2d 603, 622-625 (2d Cir. 1979).

The only specific complaint that petitioners make about the supplemental charge is that it failed to give the jury guidance as to "the individual accountability of a particular defendant with regard to the conspiracy charged" (Pet. 6). In fact, however, the court specifically advised the jury that its task was to determine whether "any of the defendants * * * were knowing participants" in the charged conspiracy (Tr. 7829). If the evidence did not establish that proposition beyond a reasonable doubt as to a particular defendant, the court charged that the defendant must be acquitted (Tr. 7829-7830). In the passage quoted by petitioner, as well as elsewhere in its instructions, the court repeatedly referred to the jury's obligation to examine the guilt of each defendant separately. The supplemental instruction therefore was not erroneous.

4. Petitioner Sharrocks contends (Pet. 7) that the district court improperly penalized him for his failure to cooperate with the government. The short answer to petitioner's claim is that, as a reading of the sentencing transcript makes clear, petitioner's failure to cooperate was not a factor in the district court's sentencing decision.

The district court clearly explained its reasons for the sentence it imposed. The court was convinced that

petitioner was a "major figure in this conspiracy," that his participation continued over at least a five-year period of time, and that the use of petitioner's contacts at JFK airport from his prior employment was "a rather essential part of the success that this wide-ranging importation conspiracy had" (C.A. App. 752-753).[1] The district judge further referred to the seriousness of drug smuggling (C.A. App. 753). Finally, he noted that rehabilitation was not a realistic prospect, and that therefore "the punishment must fit the crime" (C.A. App. 754).[2]

At no time in the course of outlining his reasons for the sentence did the district judge mention petitioner's non-cooperation.[3] Nor is it reasonable to infer that non-cooperation was a factor in his decision simply because the maximum sentence was imposed. For the judge also sentenced petitioner Leonard to the maximum term allowable for the same crimes, and there was no suggestion in Leonard's case that non-cooperation was taken into account in fixing his sentence (C.A. App. 725).

Petitioner bases his contrary view on a brief colloquy between defense counsel and the court during

---

[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] The judge added that he had conferred with other judges in the district about the sentence pursuant to the "panel sentencing" practice in the Eastern District of New York (C.A. App. 754).

[3] Compare *Roberts* v. *United States*, 445 U.S. 552 (1980) (explicit reliance by sentencing judge on defendant's lack of cooperation); *United States* v. *Tucker*, 404 U.S. 443, 444 & n.1 (1972) (explicit reliance by sentencing judge on prior convictions that were later invalidated).

the sentencing hearing. When counsel asserted categorically that petitioner's lack of cooperation could not be taken into account in sentencing, the district court, referring to *Roberts* v. *United States*, 445 U.S. 552 (1980), stated that "the Supreme Court has recently ruled otherwise" (C.A. App. 739). Defense counsel then addressed the *Roberts* decision and distinguished it on the ground that petitioner, unlike Roberts, had timely invoked his Fifth Amendment privilege as the basis for refusing to cooperate (C.A. App. 739).[4] The district court did not disagree with counsel or suggest that non-cooperation should be considered as a relevant factor in imposing sentence in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

---

[4] In *Roberts*, the defendant had not timely asserted his Fifth Amendment privilege, and the Court reserved decision on the question whether non-cooperation could be considered if it were the product of a timely assertion of the privilege. See 445 U.S. at 559.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 346321 321